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IN THE COURT OF APPEALS OF INDIANA

DEWAYNE EASLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0707-CR-638
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Eichholtz, Commissioner
Cause No. 49G23-0507-FA-128411

June 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Dewayne Easley appeals his convictions and sentences for dealing in cocaine as a class A felony,[1] possession of cocaine and a firearm as a class C felony,[2] possession of cocaine as a class C felony,[3] possession of marijuana as a class A misdemeanor,[4] and resisting law enforcement as a class A misdemeanor.[5] Easley raises two issues, which we revise and restate as:

I. Whether the evidence is sufficient to sustain his convictions for dealing in cocaine as a class A felony, possession of cocaine and a firearm as a class C felony, possession of cocaine as a class C felony, and possession of marijuana as a class A misdemeanor;

II. Whether the trial court abused its discretion in sentencing Easley; and

III. Whether Easley's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. On July 26, 2005, the Indianapolis Metropolitan Police Department executed a no knock warrant at an apartment on 38th Street in Indianapolis. Detective Chad Mann entered the apartment with the other officers and kicked open a

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[1] Ind. Code § 35-48-4-1 (2004) (subsequently amended by Pub. L. No. 151-2006, § 22 (eff. July 1, 2006)).

[2] Ind. Code § 35-48-4-6(b)(1)(B) (2004) (subsequently amended by Pub. L. No. 151-2006, § 24 (eff. July 1, 2006)).

[3] Ind. Code § 35-48-4-6(b)(1)(A) (2004) (subsequently amended by Pub. L. No. 151-2006, § 24 (eff. July 1, 2006)).

[4] Ind. Code § 35-48-4-11 (2004).

[5] Ind. Code § 35-44-3-3 (2004) (subsequently amended by Pub. L. No. 143-2006, § 2 (eff. July 1, 2006)).

door to a bedroom. Detective Mann saw Easley leaning out of the bedroom window that faced 38th Street and saw Jeffrey Adams leaning out of the bedroom window that faced the alley. Officer Patrick Collins, who was stationed outside of the apartment building on 38th Street, saw Easley throw an object out of the window. The object, later identified as a bag of cocaine and a bag of marijuana, landed approximately one foot from Officer Collins.

Detective Mann ordered Easley and Adams to the floor, and both men complied. While Detective Mann was handcuffing Adams, Detective Chris Reid entered the bedroom and turned his attention to Easley. Detective Reid saw that Easley's left hand was stretching toward a handgun and his right hand was underneath the bed. Detective Reid saw Easley's fingertips touch the gun, but Easley did not grip the weapon. Easley refused to bring his right hand out from underneath the bed, and other officers arrived to assist Detective Reid. Eventually, the officers tasered Easley, and they were able to place the handcuffs on him. When Easley stood up, the officers found $351.00 on the floor. Underneath the bed, officers found a large plastic bag that contained over one hundred smaller baggies of crack cocaine.

The officers arrested Easley, Adams, and three other people who ran from the apartment. In searching the apartment, the officers also found a rifle in the dining room, a shotgun in the living room, ammunition, a bulletproof vest, handcuffs, and taser cartridges that had been stolen from a police car. In the bedroom in which Easley was found, the officers located a small baggie of pills later identified as Ecstasy, a rock of

crack cocaine, a gun holster, pictures of Easley and other people, ammunition, and a receipt bearing Easley's name.

The State charged Easley with: (1) Count I, conspiracy to commit dealing in cocaine as a class A felony; (2) Count II, dealing in cocaine as a class A felony; (3) Count III, possession of cocaine and a firearm as a class C felony; (4) Count IV, possession of cocaine as a class C felony; (5) Count V, unlawful possession of a firearm by a serious violent felon as a class B felony; (6) Count VI, theft as a class D felony; (7) Count VII, maintaining a common nuisance as a class D felony; (8) Count VIII, possession of marijuana as a class A misdemeanor; and (9) Count IX, resisting law enforcement as a class A misdemeanor.

The State dismissed Count I, conspiracy to commit dealing in cocaine as a class A felony; Count V, unlawful possession of a firearm by a serious violent felon as a class B felony; and Count VII, maintaining a common nuisance as a class D felony. During the jury trial, the trial court granted Easley's motion for a directed verdict as to Count VI, theft as a class D felony. The jury found Easley guilty of Count II, dealing in cocaine as a class A felony; Count III, possession of cocaine and a firearm as a class C felony; Count IV, possession of cocaine as a class C felony; Count VIII, possession of marijuana as a class A misdemeanor; and Count IX, resisting law enforcement as a class A misdemeanor.

At the sentencing hearing, the trial court identified Easley's criminal history and the nature and circumstances of the offenses as aggravators and found no mitigators. The trial court sentenced Easley to thirty-five years for the dealing in cocaine conviction, two

years for the possession of cocaine and possession of cocaine and a firearm convictions, one year for the possession of marijuana conviction, and one year for the resisting law enforcement conviction. The trial court ordered that the sentences for dealing in cocaine and resisting law enforcement be consecutive but that the remaining sentences be concurrent for an aggregate sentence of thirty-six years in the Indiana Department of Correction.

I.

The first issue is whether the evidence is sufficient to sustain Easley's convictions for dealing in cocaine as a class A felony, possession of cocaine and a firearm as a class C felony, possession of cocaine as a class C felony, and possession of marijuana as a class A misdemeanor. Easley does not challenge the sufficiency of the evidence to sustain his conviction for resisting law enforcement as a class A misdemeanor.

When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. Id. We consider conflicting evidence most favorably to the trial court's ruling. Id. We affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. Id.

With respect to each of the convictions in question, Easley contends that the evidence was insufficient to demonstrate that the substances found in the apartment and outside the window were actually cocaine and marijuana. With respect to the conviction for possession of cocaine and a firearm as a class C felony, Easley also contends that the evidence was insufficient to demonstrate that he possessed a handgun.

A. *Identification of Substances as Cocaine and Marijuana*.

Easley argues that the State failed to prove that the substances were cocaine and marijuana under scientific standards announced in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993). Easley did not object to the admission of the cocaine or the marijuana and did not object to the forensic chemist's testimony regarding the substances. Failure to object at trial to the admission of evidence results in waiver of that issue on appeal. Kubsch v. State, 784 N.E.2d 905, 923 (Ind. 2003). Consequently, Easley has waived this issue.

Waiver notwithstanding, we note that "the Daubert court outlined five key considerations: (1) whether the theory or technique at issue can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the technique is generally accepted within the relevant scientific community." West v. State, 805 N.E.2d 909, 913 (Ind. Ct. App. 2004), trans. denied. Although these considerations are useful in determining reliability, the Indiana Supreme Court has held: "there is no specific 'test' or set of

'prongs' which must be considered in order to satisfy Indiana Evidence Rule 702(b)."[6] McGrew v. State, 682 N.E.2d 1289, 1292 (Ind. 1997). "Rather, reliability may be established by judicial notice or by sufficient foundation to convince the trial court that the relevant scientific principles are reliable." West, 805 N.E.2d at 913. "When laying a sufficient foundation, the focus must be on the principles and methodology behind the science rather than the conclusions generated." Id. Thus, contrary to Easley's argument, the State was not required to prove each consideration discussed in Daubert.

Further, the Indiana Supreme Court has held that the identity of a drug can be proven by circumstantial evidence. Halsema v. State, 823 N.E.2d 668, 673 n.1 (Ind. 2005). In fact, "[i]n the absence of expert testimony based on chemical analysis, this may include the 'testimony of someone sufficiently experienced with the drug indicating that the substance was indeed a dangerous drug.'" Id. (quoting Slettvet v. State, 258 Ind. 312, 280 N.E.2d 806, 808 (1972)).

Here, a forensic chemist testified that she picked up the evidence from the IPD property room, inventoried the contents of the heat-sealed envelopes, performed preliminary tests on the substances, and then performed additional tests on the substances to obtain a final identification. She also testified as to the weight of each substance.

We conclude that this testimony was sufficient to establish the identity of the substances and that the trial court did not abuse its discretion by admitting the testimony

[6] Ind. Evidence Rule 702(b) provides: "Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable."

and the substances. See, e.g., id. (holding that the testimony was sufficient where an officer identified the contents of a plastic evidence bag as methamphetamine). Thus, the State presented evidence of probative value from which the jury could have found that Easley possessed cocaine and marijuana.

B. *Possession of the Handgun.*

Easley argues that the State failed to prove that he was in possession of the handgun and, thus, that the evidence is insufficient to sustain his conviction for possession of cocaine and a firearm as a class C felony. The possession of contraband may be either actual or constructive. Henderson v. State, 715 N.E.2d 833, 835 (Ind. 1999). Actual possession occurs when a person has direct physical control over the item. Id. Constructive possession occurs when a person has both: "(1) the intent to maintain dominion and control and (2) the capability to maintain dominion and control over the contraband." Goliday v. State, 708 N.E.2d 4, 6 (Ind. 1999). While the State argues that Easley had actual possession of the gun because his fingertips touched the weapon, we choose to analyze the sufficiency of the evidence under a constructive possession theory. Thus, we must determine if the State presented sufficient evidence to show that Easley had the intent and capability to maintain dominion and control over the gun.

The intent element of constructive possession is shown if the State demonstrates the defendant's knowledge of the presence of the contraband. Id. "This knowledge may be inferred from either the exclusive dominion and control over the premise containing the contraband or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband." Id.

Here, Easley's control over the apartment was apparently non-exclusive. Where a person's control over the premises where contraband is found is non-exclusive, intent to maintain dominion and control may be inferred from additional circumstances that indicate that the person knew of the presence of the contraband. Hardister v. State, 849 N.E.2d 563, 574 (Ind. 2006). Additional circumstances may include: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the drugs or weapons; (5) drugs or weapons in plain view; and (6) location of the drugs or weapons in close proximity to items owned by the defendant. Id. The capability requirement is met when the State shows that the defendant is able to reduce the contraband to his personal possession. Goliday, 708 N.E.2d at 6.

Clearly Easley had knowledge of the gun and had the capability to place the gun in his possession. After Detective Mann ordered Easley and Adams to the floor, another detective entered the room and observed Easley's left hand stretching toward the gun on the floor. The detective saw Easley's fingertips touch the gun, but Easley did not grip the weapon. Easley resisted the officers when they tried to arrest him, and other possessions belonging to Easley were found in the bedroom. Under these circumstances, we conclude that the State presented probative evidence from which the jury could find that Easley possessed the gun. See, e.g., Ables v. State, 848 N.E.2d 293, 296 (Ind. Ct. App. 2006) (holding that the defendant had constructive possession where she was in the vehicle in which the gun was found, was in close proximity to the gun, reached down

when she saw the officers, and admitted that the gun was in the center console with her cell phone).

II.

The next issue is whether the trial court abused its discretion in sentencing Easley. We note that Easley's offenses were committed after the April 25, 2005 revisions of the sentencing scheme.[7] In clarifying these revisions, the Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Id.

A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence--including a finding of aggravating and mitigating factors if any--but the record does not

[7] Easley argues that "Indiana's old sentencing scheme" was used by the trial court and that the enhanced sentence is invalid under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), reh'g denied. Appellant's Brief at 20. The Indiana Supreme Court has held that we apply the sentencing scheme in effect at the time of the defendant's offense. See Robertson v. State, 871 N.E.2d 280, 286 (Ind. 2007) ("Although Robertson was sentenced after the amendments to Indiana's sentencing scheme, his offense occurred before the amendments were effective so the pre-Blakely sentencing scheme applies to Robertson's sentence."); Gutermuth v. State, 868 N.E.2d 427, 432 n. 4 (Ind. 2007) ("Because both the crime and the sentencing in Prickett pre-dated the enactment of the new regime, the same statute was in effect at the time of Prickett's sentence and his crime. Had the new statute become effective between the date of Prickett's crime and his sentencing, the version of the statute in effect at the time of Prickett's crime would have applied."). Easley's offense was committed after the revisions to the sentencing statute. Thus, we apply the revised sentencing scheme, to which Blakely is not applicable. See Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005), cert. denied, 126 S. Ct. 545 (2005). As a result, we do not address Easley's Blakely arguments.

support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id.

A. *Aggravators.*

The trial court here found two aggravators – Easley's criminal history and the nature and circumstances of the offense. Easley first argues that the trial court's use of his criminal history as an aggravator was improper because the prior convictions were "contained in an unproven, unsworn, and unverified pre-sentence investigation report." Appellant's Brief at 16-17. Easley seems to argue that his criminal history had to be proven by "sworn testimony or certified documents." Id. at 17.

Easley cites no authority for this argument. Consequently, this issue is waived. See, e.g., Cooper v. State, 854 N.E.2d 831, n.1 (Ind. 2006) (holding that the defendant's contention was waived because it was "supported neither by cogent argument nor citation to authority"); Shane v. State, 716 N.E.2d 391, 398 n.3 (Ind. 1999) (holding that defendant waived argument on appeal by failing to develop a cogent argument).

Waiver notwithstanding, we note that the rules of evidence do not apply to sentencing proceedings. Ind. Evidence Rule 101(c)(2). Further, we rejected this same

argument in Dillard v. State, 827 N.E.2d 570, 576 (Ind. Ct. App. 2005) (holding that the "information contained [in the PSI] need not be documented, verified, or proven in any particular way, such as by attaching birth certificates, church memberships, or abstracts of judgment of conviction to the presentence investigation report" unless the defendant challenges the information), trans. denied. Easley did not object to the trial court's use of his PSI report, reported that he had examined the report, and made only minor corrections to his criminal history. Consequently, Easley's argument fails.

Easley also argues that the second aggravator, the nature and circumstances of the offense, was improper. The trial court found that the apartment was "a dangerous scene," that "[t]here were numerous weapons found," that "[t]here were large amounts of drugs found," that there were pictures indicating that Easley was involved in gang activity, and that a bullet-proof vest was found in the apartment. Transcript at 481. Easley contends that these facts "are no more egregious than those ordinary facts that are commonly associated with the drug trade which facts are used to support a conviction for dealing in narcotics as a Class A Felony." Appellant's Brief at 17.

In effect, Easley argues that the trial court used a material element of his offenses as an aggravating circumstance. "[A] material element of the underlying offense may not serve as an aggravating circumstance to enhance a defendant's sentence." West v. State, 755 N.E.2d 173, 185 (Ind. 2001). The rule is "based on the sound logic that a presumptive sentence already assumes the underlying elements and that it is therefore improper to enhance a sentence based on an act for which the defendant is already presumed to be punished." Id. at 185-186. Other than the large amount of drugs found,

the facts at issue here are not material elements to Easley's crimes. See Smith v. State, 780 N.E.2d 1214, 1219 (Ind. Ct. App. 2003) (holding that the fact the defendant had 85 grams of cocaine could not be used as an aggravator where the defendant was charged with having three grams or more of cocaine), trans. denied. Rather, the remaining facts relate to the nature and circumstances of the crimes, which a trial court may properly consider as an aggravating factor. See, e.g., Glass v. State, 801 N.E.2d 204, 208 (Ind. Ct. App. 2004) (holding that the facts were not material elements of the crime and related to the nature and circumstances of the offense). Despite the trial court's mention of the large amount of drugs, we conclude that the remaining facts mentioned support the trial court's use of the nature and circumstances of the offenses as an aggravating factor.

B. *Proposed Mitigators.*

The trial court found no mitigators, but Easley argues that the trial court overlooked his remorse and the fact that he has a dependent as mitigators. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Anglemyer, 868 N.E.2d at 493. However, "[i]f the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist." Id.

With regard to Easley's claim that the trial court overlooked his remorse, the trial court is in the best position to judge the sincerity of a defendant's remorseful statements. Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), trans. denied. Easley claimed that he was remorseful, but his statement at the sentencing hearing indicated that he

blamed the police and his attorney for his situation. Under these circumstances, we conclude that the trial court acted within its discretion in declining to identify Easley's remorse as a mitigating circumstance.

With regard to Easley's claim that the trial court overlooked hardship on his dependent, we note that the Indiana Supreme Court has held: "Many persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999). Easley presented no evidence that he was supporting his child, much less that special circumstances existed. We conclude that the trial court did not abuse its discretion by declining to identify Easley's claim as a mitigating factor. See, e.g., id.

C. *Weighing of Factors.*

Easley also contends that the trial court "failed to properly weigh aggravating and mitigating factors." Appellant's Brief at 16. Under Anglemyer, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Anglemyer, 868 N.E.2d at 491. Thus, Easley's argument is not reviewable.

III.

The final issue is whether Easley's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the

offense and the character of the offender."[8] Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

We first note that Easley argues that "*enhanced* sentences should be reserved for the very worst offenses and offenders." Appellant's Brief at 14 (emphasis added). However, Easley misstates the standard. The Indiana Supreme Court has held:

> "[T]he *maximum possible sentences* are generally most appropriate for the worst offenders." This is not, however, a guideline to determine whether a worse offender could be imagined. Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario. Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the class of offenses and offenders that warrant the maximum punishment. But such class encompasses a considerable variety of offenses and offenders.

Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002) (internal citations omitted) (emphasis added). Here, Easley received an *enhanced* sentence, but he did not receive the *maximum* sentence. Thus, this principle is inapplicable.

Our review of the nature of the offense reveals that Easley and others were arrested in an apartment containing a significant amount of drugs and some guns. Officers saw Easley throwing cocaine and marijuana from the apartment window. Easley struggled with the officers and attempted to reach for a handgun during his arrest.

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[8] Easley argues that his sentence is manifestly unreasonable. Prior to January 1, 2003, we reviewed a sentence to see if it was "manifestly unreasonable." However, the Indiana Supreme Court amended Ind. Appellate Rule 7(B), effective January 1, 2003. We now review a sentence to see if it is inappropriate in light of the nature of the offense and the character of the offender.

Our review of the character of the offender reveals that, although twenty-six-year-old Easley describes his criminal history as "insignificant," we must disagree. Appellant's Reply Brief at 7. The PSI indicates that, as a juvenile, Easley was adjudged delinquent for offenses that would have been trespass and theft if committed by an adult. As an adult, Easley was found guilty of carrying a handgun without a license as a class A misdemeanor, possession of marijuana as a class A misdemeanor, driving while suspended as a class A misdemeanor, possession of cocaine as a class B felony, and dealing in cocaine as a class B felony.

Given the circumstances of the offenses and Easley's criminal history, we cannot say that the thirty-six year sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Hale v. State, 875 N.E.2d 438, 446 (Ind. Ct. App. 2007) (holding that a fifty-year sentence for dealing in cocaine as a class A felony was not inappropriate), trans. denied.

For the foregoing reasons, we affirm Easley's convictions and sentences.

Affirmed.

NAJAM, J. and DARDEN, J. concur